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Supp. Ct.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 60

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1945
CERTIORARI GRANTED MAY 28, 1945

No. 10760

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER and RUDOLPH WAGNER,

Appellants,

vs.

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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337 Tenth Street
Richmond, California

JACKSON MADDUX, ESQ.,

333 Montgomery Street
San Francisco, California

Attorneys for Defendants and Appellants.

HON. FRANK J. HENNESSY,

United States Attorney

W. E. LICKING, ESQ.,

Assistant United States Attorney
Post Office Building
7th and Mission Streets
San Francisco, California

Attorneys for Plaintiff and Appellee.

In the Southern Division of the District Court of the United States for the Northern District of California

Civil Action File No. 22363-G

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Plaintiff,

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, RUDOLPH WAGNER, and THE SAN FRANCISCO BANK, as it is EXECUTOR OF THE WILL OF ALVINA WAGNER,

Defendant.

COMPLAINT

1. This action arises under the Act of March 3, 1911; 36 Stat. 1091; U.S. Code, Title 28, Section 41(1) and under the Act of October 6, 1917; 40 Stat. 425; U.S. Code, Title 50, Appendix, section 17; as hereinafter more fully appears.

2. The plaintiff is Alien Property Custodian. [1*]

3. The defendant The San Francisco Bank is a California banking corporation which has its principal place of business in San Francisco, California. It is executor of the will of Alvina Wagner, late of San Francisco, California, who died on or about June 6, 1942. That defendant will hereinafter be

*Page numbering appearing at foot of page of original certified Transcript of Record.

referred to as the "defendant executor". The will was admitted to probate on or about June 26, 1942 by the Superior Court of the State of California in and for the City and County of San Francisco. A copy of the will is attached hereto as Exhibit A.

4. The names and residences of the other defendants are as follows:

Alvina Allen, Oakland, California,
Gertrude Dinwiddie, Tarzana, California,
Hilda Pigozzi, Oakland, California,
Fred Wagner, Oakland, California,
Paul Wagner, Oakland, California, and
Rudolph Wagner, Pope Valley, California.

Those six defendants will hereinafter be referred to as the "individual defendants".

5. The late Alvina Wagner left ten heirs at law surviving her. Six of those heirs at law are the indidual defendants named in paragraph 4. The other four,

Paula Knuppel,
Olga Kruager,
Fritz Wagner, and
Paul Wagner,

are all nationals of and residing in Germany.

6. On or about December 30, 1942 the individual defendants filed in the Superior Court of the State of California in and for the city and county of San Francisco, a petition for determination of heirship. A copy of that petition is attached hereto as Exhibit B. [2] That petition has not been heard, and no determination of heirship has been made.

7. On January 23, 1943, in compliance with law, the plaintiff issued Vesting Order No. 762. A copy thereof is attached hereto as Exhibit C.

8. The Vesting Order was filed with the Division of the Federal Register on January 27, 1943, and was published in 8 Federal Register 1252, all in compliance with law.

9. By virtue of the Vesting Order, the plaintiff became the owner of, and entitled to receive in distribution, the entire net estate of the late Alvina Wagner, after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent.

10. By virtue of the Vesting Order, the plaintiff became the owner of and entitled to receive in distribution, subject to payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, the real property now in possession of the San Francisco Bank, as it is executor of the Will of Alvina Wagner, decedent, which real property is more particularly described in paragraphs numbered 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of said Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C", reference to which description is hereby made and made a part hereof as though fully set forth herein; all of said property being situated in the City and County of San Francisco, State of California.

Wherefore, the plaintiff demands that a judgment be entered (1) determining that the individual defendants are entitled to no part of the

estate, (2) determining that the plaintiff is entitled to the entire net estate after payment of expenses of administration, inheritance and estate taxes if any, and debts [3] of the decedent, (3) determining that the plaintiff is the owner of that certain real property which is more particularly described in paragraphs 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C", reference to which description is hereby made and made a part thereof as though fully set forth herein, subject to the payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, and (4) ordering the defendant executor to pay the entire net estate to the plaintiff upon the allowance of its final account as executor.

Signed: FRANK J. HENNESSY,
United States Attorney
Address: 422 Post Office Building,
San Francisco, Calif.

Of counsel
A. MATT WERNER
General Counsel,
Office of Alien Property Custodian. [4]

Signed: GEORGE A. McNULTY,
Chief, Alien Property Unit
War Division, Department of
Justice, Washington, D. C.
Signed: WALLACE H. WALKER,
Attorney, Alien Property Unit
War Division, Department of
Justice, Washington, D. C. [5]

EXHIBIT A

I, Alvina Wagner, a resident of San Francisco, California, do make, publish and declare this to be my last Will and Testament, in the manner following, that is to say:

First: I give, bequeath and devise to my brother, Paul Wagner, my brother, Fritz Wagner, my sister, Olga Kruager and my niece, Paula Knuppel, all of my property, be it real or personal, wheresoever situate, of which I die possessed, and to share equally.

Second: In the event that my said niece, Paula Knuppel, predeceases me, then and in that event the share of my estate so bequeathed and devised to her, I hereby give, bequeath and devise to her son, (whose given name I do not know).

Third: I hereby nominate and appoint The San Francisco Bank, to act as Executor of this my last Will and Testament.

Fourth: I hereby revoke all former Wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this 23rd day of December, 1941.

(Signed) ALVINA WAGNER

Witness:

(Signed) JOSEPH NUHN

Residing at 3054 San Bruno Ave. San Francisco, Calif.

Witness:

(Signed) ALFRED VOYCE

Residing at 1239 Polk Street San Francisco, California.

[6]

"EXHIBIT B"

In the Superior Court of the State of California
In and For the City and County of San Francisco

Probate No. 90121 Dept. Nine

In the Matter of the Estate of

ALVINA WAGNER,

sometimes known as ALVINE WAGNER,
sometimes known as ALWINA WAGNER,
sometimes known as ALWINE WAGNER,
and sometimes known as ALVINA T. WAGNER,
Deceased.

To the Honorable Superior Court Aforesaid:

The petition of Rudolph Wagner, Paul Wagner, Alvina Allen, Fred Wagner, Gertrude Dinwiddie and Hilda Pigozzi respectfully shows:

I.

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner dies testate on the 6th day of June, 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th day of June 1942, the San Francisco Bank was appointed by the aforesaid Superior Court, executor of the estate of said deceased, and that thereafter on said day it qualified as said [7] executor, and that it is now the duly qualified and acting executor of said estate.

II.

That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

III.

That your petitioners are nephews and nieces of said decedent and are her heirs; that the other heirs of the said decedent are Paul Wagner, brother; and Fritz Wagner, brother; and Olga Kruager, sister, and Paula Kruppel, niece; that Paul Wagner, Fritz Wagner, Olga Kruager, and Paula Kruppel are citizens and residents of Halle, Germany, and as such not entitled to share in the estate of said decedent; that petitioners are entitled to have the whole of said estate distributed to them.

IV.

That said estate consists of separate property, decedent being a single woman at the time of her death.

V.

That the said property is described in the Inventory and Appraisement on file herein.

VI.

That there are various persons who claim an interest in the estate of the deceased, and that the rights of such persons so claiming an interest in said estate have not been determined by any court of competent jurisdiction.

Wherefore, your petitioners pray that the court determine who are entitled to distribution of the Estate of Alvina Wagner, [8] also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner, deceased.

S. C. MASTERSON
Attorney for Petitioners

State of California
County of Contra Costa—ss.

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Richmond, Contra Costa County, California, and is the attorney for petitioners in the above-entitled action; that the petitioners are absent from the county wherein the affiant has his office and for that reason the affiant makes this verification on petitioners behalf; that he has read the foregoing Petition and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON

Subscribed and sworn to before me this 30th day of December, 1942.

[Seal] MABEL D. SOUSA
Notary Public in and for the County of Contra Costa, State of California. [9]

"EXHIBIT C"

Office of Alien Property Custodian
Washington
Vesting Order Number 762

In re: Estate of Alvina Wagner, deceased (File D-28-4419; E. T. Sec. 1209)

Under the authority of the Trading with the Enemy Act as amended, Executive Order 9095 as amended, and pursuant to law, the Alien Property Custodian after investigation,

Finding that—

(1) The property and interests described below in subparagraphs (a) and (b) are property which is in the process of administration by The Francisco Bank, Executor, 526 California Street, San Francisco, California, acting under the judicial supervision of the Superior Court of the State of California, in and for the City and County of San Francisco;

(2) Such property and interests are payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely,

Nationals:	Last known address:
Fritz Wagner	Germany
Olga Krauger	Germany
Paula Knuppel	Germany
Paul Wagner	Germany

(3) The property and interests described in subparagraph (b) are property within the United States owned or controlled by the aforesaid nationals of a designated enemy country, Germany; and

Determining that—

(4) If such nationals are persons not within any designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, Germany; and

Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it necessary in the national interest,

Now, Therefore, the Alien Property Custodian hereby vests the following property and interests:

(a) All right, title, interest, and claim of any kind or character whatsoever of Fritz Wagner, Olga Grauger, Paula Knuppel, and Paul Wagner, and each of them, in and to the estate of Alvina Wagner, deceased; and

(b) All right, title, interest, and estate, both legal and equitable, of Fritz Wagner, Olga Kruager, Paula Knuppel, and Paul Wagner, and each of them, in and to the real property situated in the City and County

of San Francisco, State of California, and described as follows: [10]

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a Portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging,

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement,

Being a part of Outside Land Block No. 882. Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging,

to be held used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and interests and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property and interests or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if any when it should be determined that such return should be made or such compensa- [11] tion should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Dated: January 23, 1943
(Signed) LEO T. CROWLEY
Leo T. Crowley
Alien Property Custodian

[Official Seal]

Certified to be a true copy of the original
(Signed) FRANCIS A. MAHONY
Francis A. Mahony, Secretary
Office of Alien Property
Custodian

[Endorsed]: Filed April 6, 1943. [12]

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, and move the Court for an Order to strike the complaint on file herein [13] on the following ground:

That this Court has no jurisdiction over the subject matter in this action.

S. C. MASTERSON
Attorney for Said Defendants.
337 Tenth Street
Richmond, California
Richmond 4161

Copies mailed this date to:
(1) The San Francisco Bank
526 California Street
San Francisco, California

(2) Frank J. Hennessy
United States Attorney
422 Post Office Building
San Francisco, California

(3) A. Matt Werner
General Counsel
Office of Alien Property Custodian
Washington, D. C.

(4) George A. McNulty
Chief, Alien Property Unit
War Division, Department of Justice
Washington, D. C.

(5) Wallace H. Walker
Attorney, Alien Property Unit
War Division, Department of Justice
Washington, D. C.

Dated: May 25, 1943.

S. C. MASTERSON

[Endorsed]: Filed May 25, 1943. [14]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE SAN FRANCISCO BANK

The San Francisco Bank, one of the defendants in this action, answers the complaint as follows:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the complaint.

2. Answering the allegations of paragraphs 9 and 10 of the complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth thereof.

This defendant alleges further that the other defendants claim and assert that they are the owners of and entitled to distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, to the exclusion of plaintiff; that the claims of those defendants are adverse to and in conflict with the claim of plaintiff; that this defendant has no knowledge or belief which enables it to determine, and this defendant is unable to determine, whether in law and in fact plaintiff is the owner of and entitled to receive distribution of the net [15] estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, or whether in law and in fact the other defendants are the owners thereof and entitled to receive distribution thereof.

Wherefore, this defendant prays that a judgment be entered (1) determining who, of the parties to this action, is the owner of and entitled to distribution of the net estate and the real property mentioned in the complaint, subject to the payment of expenses of administration, inheritance and estate taxes and debts of the decedent; (2) discharging this defendant from all liability except to the person or persons the court shall adjudge to be the owner or owners thereof

and entitled to distribution thereof, and (3) directing and aiding this defendant in the premises.

JACKSON MADDUX

Attorney for defendant The San Francisco Bank, Executor of the Will of Alvina Wagner

[Endorsed]: Filed May 28, 1943. [16]

[Title of District Court and Cause.]

ANSWER AND CROSS-CLAIM

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner and answer the complaint on file herein as follows:

First Defense

I.

The complaint fails to state a claim against defendants upon which relief can be granted. [17]

Second Defense

I.

That this Court has no jurisdiction over the subject matter in this action.

Third Defense

I.

Defendants above-named admit the allegations contained in paragraphs 2, 3, 4, 5 and 6 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in paragraphs 7 and 8 of the complaint; deny each and every other allegation contained in the complaint.

Cross-Claim

I.

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner died testate on the 6th day of June, 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th of June, 1942, the San Francisco Bank was appointed by the Superior Court of the State of California In and For the City and County of San Francisco, executor of the estate of said deceased, and that thereafter on said day said San Francisco Bank qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

II.

That the Last Will and Testament of said Alvina Wagner was admitted to probate on June 26, 1942 in the Superior Court of the State of California In and For the City and County of San Francisco in that certain matter entitled "In the Matter of the Estate of Alvina Wagner" and given probate file number 90121; that in said Last Will and Testament said Alvina Wagner gave, bequeathed [18] and devised all of her property to Paul Wagner, brother, Fritz Wagner, brother, Olga Kruager, sis-

ter, and Paula Knuppel, niece; that said persons survived said testator; that said persons are, and were at all times mentioned herein, citizens and residents of Germany.

III.

That under the laws of the State of California said Paul Wagner, Fritz Wagner, Olga Kruager and Paula Knuppel are persons ineligible to take either real or personal property or the proceeds thereof by inheritance or testamentary disposition.

IV.

That the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner are the heirs at law of said Alvina Wagner and under the laws of the State of California are entitled to the distribution of the whole of the estate of said Alvina Wagner.

V.

That the estate of the said Alvina Wagner consists of the following property:

(a) Personal Property

Bank Deposits as follows:

The San Francisco Bank	$ 83.58
Bank of America	88.22
Wells-Fargo National Bank	27.06
1928 Hupmobile auto, value	15.00
Furniture at 834 Urbano Drive, San Francisco, California, value	250.00

Furniture at 7525 Geary Street, San Francisco, California, value..... 20.00
Silverware and Jewelry, value 195.00

(b) Real Property

All that real property situated in the City and County of San Francisco, State of California, and described as [18a] follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly and along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging,

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the Easterly line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-

five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

Being a part of Outside Land Block No. 882.

Together with all improvements and appurtenances thereunto belonging,

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle Northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles

Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. [19] 785. Together with all improvements and appurtenances thereunto belonging.

Wherefore, defendants above-named pray judgment that plaintiff take nothing by his complaint; that the Court determine it has no jurisdiction over the subject matter herein; that the Court determine that the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner are entitled to distribution of the whole of the estate of said Alvina Wagner; and for such other and further relief as to the Court seems equitable.

S. C. MASTERSON

Attorney for Defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner

State of California
County of Contra Costa—ss.

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in Richmond, Contra Costa County, California, and is the attorney for defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner in the above entitled action; that defendants are unable to make the verification because they are absent from said county

and for that reason affiant makes this verification on defendants' behalf; that he has read the foregoing Answer and Cross-Claim and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON

Subscribed and sworn to before me this 7 day of July, 1943.

[Seal] A. A. ALSTROM

Notary Public in and for the County of Contra Costa, State of California [20]

Copies mailed to:

(1) Frank J. Hennessy
422 Post Office Building
San Francisco, California
Attention: Wilber Mathewson

(2) A. Matt Werner
General Counsel
Office of Alien Property Custodian
Washington, D. C.

(3) George A. McNulty
Chief, Alien Property Unit
War Division, Department of Justice
Washington, D. C.
Attention: Wallace H. Walker

(4) The San Francisco Bank
526 California Street
San Francisco, California

[Endorsed]: Filed July 8, 1943. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION

To S. C. Masterson, Esq., Attorney at law, Room 105 Syndicate Bldg., 337 10th Street, Richmond, California;

Jackson Maddux, Esq., Attorney at law, 333 Montgomery Street, San Francisco, California;

Robert W. Kenny Attorney General for the State of California, State Building, San Francisco, California:

Please take notice that on Saturday, July 31, 1943, at the hour of 10:00 A.M. in the Courtroom of Judge Louis E. Goodman, Post Office Building, San Francisco, the plaintiff above-named will move the Honorable Court for judgment on the pleadings in the above-entitled case as against all of the defendants. A copy of the said Motion is enclosed herewith.

Dated: July 24, 1943.

FRANK J. HENNESSY
United States Attorney.
By W. E. LICKING
Ass't U. S. Atty. [22]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff moves the court for judgment on the pleadings against all defendants herein.

FRANK J. HENNESSY
United States Attorney
7th and Mission Streets
San Francisco, California
GEORGE A. McNULTY
Chief, Alien Property Unit,
War Division
Department of Justice
Washington, D. C.
Attorneys for the plaintiff.

[Endorsed]: Filed July 26, 1943. [23]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 17th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, D.J.

[Title of District Court and Cause.]

No. 22563-G Civil

The motion to strike complaint and the motion of the plaintiff for summary judgment having been heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion thereon, it is Ordered, in accordance with said opinion, that the motion to strike the complaint be and the same is hereby denied; that the motion of the plaintiff for summary judgment be and the same is hereby granted, and that a decree be entered herein granting the relief prayed for by plaintiff. [24]

[Title of District Court and Cause.]

Frank J. Hennessy
United States Attorney
San Francisco, Cal.

Thos. C. Lynch
Deputy United States Attorney
San Francisco, Cal.

A. Matt Werner
General Counsel, Office of Alien Property Custodian
Washington, D. C.

Geo. A. McNulty
Chief Alien Property Unit War Division, Dept. of Justice
Washington, D. C.

Wallace H. Walker
Chief Trial Attorney, Alien Property Unit,
War Division,
Dept. of Justice,
Washington, D. C.

Harry LeRoy Jones
Special Asst. to Attorney General
Washington, D. C.
Attorneys for Plaintiff [25]

S. C. Masterson,
Richmond, Cal.
Attorney for defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner.

Jackson Maddux,
331 Montgomery Street,
San Francisco, Cal.
Attorney for Defendant.
The San Francisco Bank.

Robert W. Kenny,
Attorney General of the State of California, and

T. A. Westphal, Jr.,
Deputy Attorney General
as amici curiae on behalf of the State of California.

Matt Wahrhaftig,
Attorney at Law,
Bank of America Bldg.,
Oakland, California,
as amicus curiae.

H. W. Falk, Jr.,
Attorney at Law,
Ukiah, Cal.,
as amicus curiae.

OPINION

Goodman, District Judge.

Alvina Wagner, a resident of California, died June 6, 1942. By her last Will and Testament, dated December 23, 1941 and admitted to probate in the Superior Court of the State of California June 26, 1942, she bequeathed all her property (several parcels of real property in San Francisco, California and some personal property of minor value) to two brothers, one sister and one niece, all nationals and residents of Germany. Six nieces and nephews, residents of California, petitioned the Superior Court as heirs of decedent for distribution of the estate to them, claiming that the German legatees were ineligible as beneficiaries [26] under Section 259, 259.1 and 259.2 of the California Probate Code, (effective July 1, 1941) which in substance provides that the right of aliens abroad to take real or personal property in the United States by will or descent, is conditioned upon the existence of a reciprocal right of Americans abroad and that such reciprocal right being absent, American heirs take. No determination of heirship has been made by the Superior Court.

On January 23, 1943, the plaintiff Alien Property Custodian, under the authority of Section 5 (b) of

the Trading with the Enemy Act, as amended by Title III of The First War Powers Act, 1941, and Executive Order 9095 of July 6, 1942, by vesting order 762, vested in himself for the use of the United States all the right title and interest of the German legatees in the estate of Alvina Wagner.

On April 6, 1943, plaintiff as Alien Property Custodian filed this action against The San Francisco Bank as executor of the Wagner Will and the six claimant heirs, for a judgment vesting ownership of the property of the estate, subject to the payment of administration expenses, inheritance and estate taxes and debts of decedent, in plaintiff and determining that defendant heirs have no right or claim thereto and ordering defendant executor to deliver over the net estate to plaintiff.

By separate answers, the defendant executor and the individual defendants claim lack of jurisdiction of this Court and allege that the individual defendants are entitled to inherit the property of the estate under California law. Defendants move to strike the complaint for lack of jurisdiction. Plaintiff moves for summary judgment in favor of plaintiff. *Both motions have been argued and submitted. All [27] parties agree that no question of fact is involved and that the cause may be determined on the motions submitted.

The issues presented for determination are:

1. Has this court jurisdiction of the subject matter?

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*(Rule 56 Rules of Civil Procedure.)

2. Is the cited California probate statute constitutional? If it is not, the property in probate should vest in plaintiff.

Plaintiff invokes the jurisdiction of this Court under 36 Stat. 1091; 28 U.S.C.A. 41 (1), being "a suit of civil nature . . . in equity, brought by the United States or by any officer thereof authorized by law to sue," and the Trading with the Enemy Act (40 Stat. 411) 50 U.S.C.A. Appendix Sec. 17, (40 Stat. 425) whereby the District Courts "are given jurisdiction to make and enter . . . all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act."

Defendants and amici curiae claim lack of jurisdiction asserting the action is in rem to determine title to property and would oust the state court of previously acquired jurisdiction of the res. (citing U. S. v. Bank of New York Co. 296 U. S. 463.)

Section 5 (b), the pertinent provision of the Trading with the Enemy Act, provides as follows:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—
>
> * * * * * * *
>
> B. investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, with-

drawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has an interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property [28] or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, . . ."

The Trading with the Enemy Act was originally enacted October 6, 1917 c. 106 40 Stat. 411, was twice amended in 1918 (40 Stat. 459; 40 Stat. 1020; again amended in 1919 (41 Stat. 35); again amended in 1920 (41 Stat. 977); again amended in May 1940 (54 Stat. 179) and once more on December 18, 1941 by the First War Powers Act (55 Stat. 839). It is strictly a war measure, finding its authority in Art. 1 § 8 Cl. 11 of the Constitution. Brown v. U. S. 8 Cranch 109; Miller v. U. S. 11 Wall. 268. By its terms, the President is granted wide authority to sequester, administer and dispose of alien enemy property in the United States and to proceed summarily and promptly to that end.

The judicial power, when properly invoked, under the Statute, should function in like manner.

Art. 1, sec. 8 cl. 11 of the Constitution empowers the Congress: "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." The powers granted to the President in the Trading with the Enemy Act include the power to make "captures" on land. The sequestering of alien enemy property under vesting orders by the Alien Property Custodian, who is the President's agent, is in the nature of a "capture" under Art. 1 sec. 8 cl. 11 of the Constitution. Shoehr v. Wallace, 255 U. S. 239, 242. [29]

The important question here presented is whether Federal jurisdiction in aid of the enforcement of this war statute, cannot be invoked because the property, sought to be vested, is in course of probate in the State court.

The jurisdiction of the Federal Courts is derived from the Constitution and Congressional enactments. It is not subject to restriction or ouster by State legislation e. g State probate procedural statutes. (Miami County Natl. Bank v. Bancroft, 121 Fed. (2d) 921, 10 Cir.) Payne v. Hook, 7 Wall. 425.

It is clear to me that the Congress intended that alien property in the United States should be "frozen" wherever found and held and administered only in the interest of and for the benefit of the United States. A complete Federal dominance in every respect over alien rights and property, to the exclusion of state or local agencies, was obvi-

ously purposed. Economic warfare, as an aid to the defeat of the enemy, can only be effective if it is centralized and possesses over-all control.

It follows that the Federal Courts, granted by the Congress the power to issue decree and process in aid of the statute, have jurisdiction to enforce by decree, vesting orders of the Alien Property Custodian.

It if appeared that the property bequeathed was unquestionably vested in United States citizens resident in California, then obviously there would be no basis for claiming Federal jurisdiction. Here, however, the validity of the State statute under which the California heirs make claim, is in issue and this, itself, furnishes the grounds for Federal jurisdiction.

The California statute (Probate Code 259, 259.1 and 259.2) reads: [30]

> § 259. "Aliens residing abroad: Dependance of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are in-

habitants and citizens and upon the rights of citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries. (Added by Stats. 1941, Ch. 895 § 1; effective July 1, 1941.)

§ 259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259. (Added by Stats. 1941, Ch. 895, § 1; Effective July 1, 1941.)

§ 259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property. (Added by Stats. 1941, ch. 895, § 1; Effective July 1, 1941.")

By the foregoing statute, California attempted to enter a field of exclusive Federal jurisdiction.

It is contended by defendants that the Probate Statute is a mere pronouncement of a rule of succession and testamentary disposition. That such is not the fact appears conclusively from the enabling clause which discloses the purpose of the statute to be:

"Sec. 2. This act is hereby declared to be an urgency measure necessary for the immedi-

ate preservation of [31] the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.

The emphasized portions of the above "purpose" clause disclose that the California State Legislature did not adopt the probate statute as an orthodox procedural rule to regulate succession to property in the ordinary course.

To the contrary, the expressed design was to fix a policy of international relations, which, the Legislature thought, would aid the United States in anticipated hostilities with a foreign government. If this were a valid exercise of state authority, by the same token, it could regulate aliens in other respects, by requiring registration, payment of fees, etc.,—all matters within the exclusive Federal field (Hines v. Davidowitz, post.) Granted the patriotic impulse prompting the enactment of the State statute, nevertheless it invades the Federal [32] field.

The Attorney General of California and other amici curiae argue that plaintiff's vesting order has no res to which to attach itself, inasmuch as under the California Probate Code, the title to the real estate involved is already vested in California heirs. If it appeared from the record that the title to the property was unquestionable, the point might be good. Here, however, the property was willed to alien nationals, and, but for the cited probate section, would so pass.

The Attorney General contends that in determining the issue presented, this court unlawfully enters the domain of State probate procedure. I do not find this to be so. The relief besought asks no more than a determination vesting the interests of the aliens in the Alien Property Custodian. The State probate procedure itself is to be untouched. See Commonwealth v. Bradford, 297 U. S. 613.

The California statute is invalid and unconstitutional because the State of California attempted, by the probate statute in question, to enter the field

of foreign relations, a domain reserved exclusively to the Federal government, free from local interference. United States v. Curtiss-Wright Export Corporation, 299 U. S. 304; U. S. v. Belmont, 301 U. S. 324.

At the time the California statute was adopted (July 1941) there was in effect, between the United States and Germany, a treaty providing for reciprocity of inheritance rights between the two nations. (Treaty of Friendship, Commerce and Consular Rights, dated December 8, 1923; ratification exchanged October 14, 1925; proclaimed October 14, 1925; 44 Stat. (part 3) 2132).

Prior to the adoption of the California statute, the [33] Congress had in May 1940 amended the Trading with the Enemy Act to provide for "freezing" control over financial transactions.

It is contended that the Treaty above referred to was abrogated by war (December 7, 1941) and hence California was free to enter the field. Head Money Cases 112 U. S. 580; Society for Propogation of Gospel v. New Haven, 8 Wheat. 464. It is not beyond question that war did in fact abrogate the treaty. Assuming that it did, by the amendment of the Trading with the Enemy Act in May 1940, the Congress clearly evidenced the intent that the Federal Government should occupy the field to the exclusion of State or local legislation. In Hines v. Davidowitz, 312 U. S. 52, at 62, Mr. Justice Murphy clearly states that:

> "When the national government by treaty or statute has established rules and regulations

touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

cf. Chy Lung v. Freeman, 92 U.S. 275, 279.

The Attorney General of California urges that the California Probate Court is a properly equipped and functioning court fully qualified to determine the questions presented in due course and that the Federal Court should "decline" jurisdiction. In view of what has been said infra re the authority and power granted to the President under the Trad- [34] ing with the Enemy Act and the mandate to the Federal Court to issue decrees and process in aid thereof, it is my view the jurisdiction should be exercised, not declined.

Neither a desire to deprive California heirs of property vesting in them under the existing California law nor a purpose to increase the holdings of plaintiff as Alien Property Custodian has any part in this decision. That California heirs, in preference to alien enemies, cannot succeed to the property

of this estate, is perhaps regrettable. However, the decision herein must rest on broader grounds.

If the limitation of the powers of the state were not sustained in principle, evils now incapable of definition, would result from state entry into the Federal field.

My conclusion is that this court has jurisdiction. Having jurisdiction, the court determines that the state probate act is unconstitutional, being an invasion of the Federal province.

The motion to strike the complaint is denied. The motion of the plaintiff for summary judgment is granted and a decree will enter granting the relief prayed for by plaintiff.

Dated: November 17th, 1943.

[Endorsed]: Filed Nov. 17, 1943. [35]

In the Southern Division of the United States District Court for the Northern District of California.

No. 22563-G

LEO T. CROWLEY, as Alien Property Custodian,
Plaintiff,

vs.

ALVINA ALLEN, and others,
Defendants.

JUDGMENT

This cause came on to be heard on the plaintiff's motion for judgment on the pleadings and on the

motions of the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner (which defendants will, for convenience, be hereinafter designated as "the six defendant heirs") to strike the complaint and to dismiss the complaint, and was argued by counsel for the parties, and briefs were submitted by counsel for the parties and by various amici curiae. Upon consideration thereof it appears to the court that the plaintiff is entitled to judgment in his favor on the undisputed facts in the pleadings.

It is therefore ordered, adjudged and decreed as follows:

1. The plaintiff's motion for judgment on the pleadings is granted.

2. The motion of the six defendant heirs to strike the [36] complaint is denied.

3. The motion of the six defendant heirs to dismiss the complaint is denied.

4. The provisions of California Statutes 1941, Chapter 895, which amended the California Probate Code by adding Sections 259, 259.1 and 259.2, contravene the provisions of Article I, Section 8, Clause 11 of the Constitution of the United States, and are therefore invalid.

5. That statute also invades, and interferes with the exercise of, the Federal Government's power over foreign affairs, and is therefore invalid.

6. The devises and legacies given by the will of Alvina Wagner, deceased, to Paula Knuppel, Olga Kruager, Fritz Wagner and Paul Wagner are

valid. Upon the death of that testatrix, title to her estate vested in those devisees and legatees, subject to administration and to the payment of expenses of administration, debts, and taxes.

7. By virtue of Vesting Order No. 762, issued by the plaintiff as Alien Property Custodian on January 23, 1943, the plaintiff acquired all right, title, interest and claim of the aforenamed devisees and legatees in and to the estate of the late Alvina Wagner.

8. None of the six individual defendants has any right, title or interest in or to the estate of the late Alvina Wagner.

9. The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes.

Dated this 28th day of December 1943.

LOUIS GOODMAN,
District Judge.

[Endorsed]: Filed Dec. 28, 1943. [37]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Frank J. Hennessy, Esq.
Geo. A. McNulty, Esq.
Wallace H. Walker, Esq.
Harry LeRoy Jones, Esq.
A. Matt Werner, Esq.
S. C. Masterson, Esq.
Jackson Maddux, Esq.
Matt Wahrhaftig, Esq.
H. W. Falk, Jr., Esq.
Robert W. Kenny, Esq., Attorney General
R. A. Westphal, Jr., Esq., Deputy

You Are Hereby Notified that on December 28, 1943, a Judgment was entered of record in this office in the above entitled case.

G. W. GALBREATH,
Clerk, U. S. District Court.
lj

San Francisco, California, December 29, 1943.
Notice Mailed of Entry of Judgment on Dec. 29, 1943. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, defendants above

named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 28, 1943.

S. C. MASTERSON

Attorney for Appellants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

337 Tenth Street
Richmond, California

[Endorsed]: Filed Mar. 27, 1944. [39]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The following is hereby designated as the record on appeal:

(1) Complaint and exhibits thereto.

(2) Defendant's Motion to Strike.

(3) Answer and Cross-Claim of Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner. [40]

(4) Plaintiff's Motion for Judgment on Pleadings.

(5) Notice to Enter Judgment.

(6) The Opinion of Judge Goodman.

(7) The Judgment.

(8) Notice of Entry of Judgment.

(9) Notice of Appeal.

(10) Designation of Record on Appeal.

(11) Statement of Points.

S. C. MASTERSON

Attorney for Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

337 Tenth Street

Richmond, California

[Endorsed]: Filed March 27, 1944. [41]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of the points upon which the appellants intend to reply upon this appeal:

(1) That the Federal Court has no jurisdiction over the subject matter.

(2) That California Probate Code section 259, 259.1 and 259.2 are constitutional and valid and apply to the property involved herein. [42]

(3) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany does not abrogate the right of the state of California to regulate succession and testamentary disposition of either (a) personal property or (b) real property.

(4) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany is either abrogated or suspended by war between the contracting powers.

(5) The California statute (Calif. Probate Code sec. 259) speaks as of the date of death of the testatrix and the non-resident alien enemies acquired no interest which the Alien Property Custodian could vest.

(6) That the Trading with the Enemy Act, as amended, and the Executive Orders made thereunder suspended the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany.

S. C. MASTERSON
Attorney for Appellants
337 Tenth Street
Richmond, California

[Endorsed]: Filed Mar. 27, 1944. [43]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 43 pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Leo T. Crowley, Etc. of Plaintiff, vs. Alvina Allen, et al., Defendants. No. 22563-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of Five Dollars and ninety cents ($5.90) and that the said amount has been paid to me by the Attorney of the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of April A.D. 1944.

[Seal] C. W. CALBREATH, Clerk
WM. J. CROSBY,
Deputy Clerk

[Endorsed]: No. 10760. United States Circuit Court of Appeals for the Ninth Circuit. Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner, Appellants, vs. Leo T. Crowley, as he is Alien Property Custodian, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 1, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Appellants,

vs.

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Appellee.

ADOPTION OF DESIGNATION OF RECORD AND STATEMENT OF POINTS

I hereby adopt the Designation of Record and Statement of Points filed in the District Court as a compliance with the provisions of Rule 19 of the Rules of this Court.

S. C. MASTERSON
Attorney for Appellants
337 Tenth Street
Richmond, California

[Endorsed]: Filed May 10, 1944. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10760

ALVINA ALLEN, GERTRUDE DENWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Order of substitution of appellee

Leo T. Crowley having resigned as Alien Property Custodian of the United States on March 27, 1944, and James E. Markham having succeeded to the office of Alien Property Custodian by appointment of the President on March 27, 1944, and having consented to his substitution as appellee in place of Leo T. Crowley,

It is hereby ordered, this 17th day of August 1944, that James E. Markham as Alien Property Custodian be substituted as appellee in the place of said Leo T. Crowley.

CURTIS D. WILBUR,
Judge of the Above-Entitled Court.

We hereby consent to the making and entry of the foregoing order:

[SEAL]

JAMES E. MARKHAM,
Alien Property Custodian of the United States.
FRANK J. HENNESSY,
United States Attorney.
W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff and Appellee.
S. C. MASTERSON,
JACKSON MADDUX.
Attorneys for Defendants and Appellants.

(Endorsed) Order of substitution of Appellee. Filed August 17, 1944. Paul P. O'Brien, *Clerk.*

634719—45

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt From Proceedings of Wednesday, December 13, 1944

Before: WILBUR, GARRECHT, and STEPHENS, *Circuit Judges*

Order of submission

Ordered appeal herein argued by Mr. S. C. Masterson, counsel for appellants, and by Mr. Wallace Walker, Attorney, Department of Justice, counsel for appellee, and by Mr. Everett W. Mattoon, Deputy Attorney General of the State of California, as counsel for the Attorney General of California, as amicus curiae, and submitted to the court for consideration and decision.

Excerpt From Proceedings of Wednesday, January 24, 1945

Before: WILBUR, GARRECHT, and STEPHENS, Circuit Judges

Order directing filing of opinion and filing and recording of decree

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10760. Jan. 24, 1945

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Before: WILBUR, GARRECHT, and STEPHENS, Circuit Judges

WILBUR, Circuit Judge: The Alien Property Custodian brought this action for a declaratory judgment against certain relatives of Alvina Wagner, alleging that the property involved had been covered by a vesting order and that he was entitled to possession thereof. He alleged that probate proceedings were in process in the superior court and that in that action a proceeding to deter-

mine heirship (Cal. Prob. Code, §§ 1080–1082) had been filed and was pending at the time he brought his complaint.

Decedent left a will in which she devised and bequeathed the property to a brother, two sisters, and one niece, who were at the time this action was brought, residents of Germany and alien enemies of the United States. The custodian sought an order that none of the heirs, either those who were residents or non-residents, were entitled to take any part of the estate and upon that basis asked the court to order the executor to pay the entire net estate to the plaintiff upon the allowance of his final account as executor. The trial court so ordered and this appeal followed.

The most important question is that of jurisdiction. The custody of the property, according to the allegations of the complaint, is in the executor acting for the probate court. That court is charged with the responsibility of determining the heirship and also of determining the effect of the will left by the deceased. Such proceeding had been inaugurated and was pending at the time the proceeding herein was filed. The custodian claims the right to invoke the jurisdiction of the federal court on the ground that he is acting for the government of the United States and under the provisions of 28 U. S. C. A. § 41 (1) he is entitled to prosecute his proceeding in the federal district court. The section relied upon does not give jurisdiction over matters of probate which are not cases or controversies within the meaning of Art. III of the Constitution. The Case of Broderick's Will, 88 U. S. 503, 517; Byers v. McAuley, 149 U. S. 608, 615.

In view of the fact that the matter is within probate jurisdiction and that court is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court. There is no reason why the custodian cannot present his claims to the property in that court. U. S. v. Bank of New York Co., 296 U. S. 463, 479; Trout v. Ogilvie, 41 Cal. App. 167; 182 Pac. 333; Estate of Burton, 93 Cal. 459; 29 Pac. 36; Estate of Belshaw, 190 Cal. 278; 212 Pac. 13.

The question as to whether or not the government should be finally successful in its claim is not involved in this appeal, if the district court had no jurisdiction to pass upon the matter.

It is suggested that the war situation has changed the applicable law and that the federal government through its custodian can use its own courts for determination of the destination of property belonging to alien enemies. It is sufficient for the present purpose to say that no such legislation has been passed by Congress.

Judgment reversed and case ordered dismissed.

(Endorsed:) Opinion. Filed Jan. 24, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Decree

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the case.

(Endorsed:) Decree. Filed and entered January 24, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

(Title of Cause and Number)

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from and including 1 to and including 55, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Charles Fahy, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of February 1945.

[SEAL]

PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

Order allowing certiorari

Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE, 1945